No. 14929

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAROLD G. BAUER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

PETITION FOR REHEARING *EN BANC*

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TO: THE HONORABLE WILLIAM HEALY, WILLIAM E. ORR, and JAMES ALGER FEE, JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Appellee, United States of America, aggrieved by this Court's Opinion dated January 29, 1957, respectfully petitions the Court for an *en banc* rehearing of this appeal.

I.

GROUNDS

Summarized, appellee's grounds for a rehearing *en banc* are:

1. This Court erred in failing to affirm the finding of the District Court that Executive Order 6260 was valid as a matter of law and in failing to decide the question of the validity of Executive Order 6260 as a matter of law.

A national emergency existed as a matter of law on February 12, 1954.

2. This Court erred in remanding the cause for further hearing before the District Court on the issue of the existence of a national emergency. If the existence or expiration of a national emergency requires the consideration of further factual evidence, such a presentation was a matter of defense on which evidence should have been offered in the court below by the appellant. Appellant's failure to offer evidence as to the expiration of a national emergency precludes further consideration of that question.

3. If a further hearing in the court below is justified this Court erred in failing to specify with clarity the nature of such a hearing.

II.

ARGUMENT

A. PROCEEDINGS IN THE COURT BELOW.

The opinion of this Court dated January 29, 1957, correctly recites at page 5 with reference to the question of the existence of a national emergency,

> " . . . the presentation as though the question were one of law was made."

The question of the validity of Executive Order 6260 was raised by appellant in the District Court on motion to dismiss the indictment (Tr. 7). Although the motion to dismiss does not specifically charge that Executive Order 6260 was invalid, the contention was made under the broader challenge that the indictment: " . . . fails to allege facts sufficient to constitute a crime by defendant against the laws of the United States of America." (Tr. 7).

At the argument on appellant's motion to dismiss the case of *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543, was cited to the District Court. In denying appellant's motion to dismiss, the District Court held Executive Order 6260 valid as a matter of law.

The question was again considered by the District Court and the validity of Executive Order 6260 was sustained as a matter of law at the time the District

Court denied appellant's motions in arrest of judgment (Tr. 10) and for new trial (Tr. 8).

B. EXECUTIVE ORDER 6260 IS VALID AS A MATTER OF LAW.

It is respectfully submitted that the treatment of this question as a purely legal issue by all parties and by the District Court was correct.

The national economic emergency declared by Presidential Proclamation No. 2039 of March 6, 1933 (31 C.F.R. 120.1), was never terminated. The continuing existence of the national emergency proclaimed in 1933, was expressly recognized by President Truman in 1947 when Proclamation No. 2039 was amended by Proclamation No. 2725 of April 7, 1947 (31 C.F.R. 120.7), excluding Federal Reserve Banks from the operation of the 1933 proclamation. Although the depression itself may have terminated, it does not follow that the emergency had also terminated. It is reasonable to assume that those persons in our Government charged with the enforcement of gold legislation considered that the threat of another depression was a sufficient cause to continue in force the earlier declaration of emergency. Unrestricted trafficking in gold could well have been a contributing cause to another depression.

It must not be forgotten that the gold legislation and particularly Executive Order 6260 has its basis not only in the power to regulate currency but also in the war power entrusted to Congress by the Constitution. The order was promulgated pursuant to the Trading with the Enemy Act of 1917 as amended by the Act of March 9, 1933 (12 U.S.C., Section 95a). Although the Executive Order was confirmed and ratified as an adjunct to the power to regulate the currency, in the Gold Reserve Act of 1934 (12 U.S.C., Section 213), it was further ratified and confirmed by an exercise of the war power in the First War Powers Act of December 18, 1941 (50 U.S.C. App., Section 617). It will thus be seen that Congress has indicated that the regulation of traffic in gold was desirable not only for purpose of preventing depression but for the purpose of enabling this country to wage war. In this connection it is significant that on December 16, 1950, President Truman declared the existence of a further national emergency by Proclamation No. 2914 (64 Stat. A454). This emergency arose out of the Korean situation. It had not been terminated on February 12, 1954, the date of appellant's unlawful possession of the gold in question.

It follows therefore that if a continuing emergency was necessary to sustain the continuing validity of Executive Order 6260 whether that emergency was

a war emergency or an economic emergency is of no consequence. The Executive Order was promulgated in 1933 under a statute which was an exercise of the war power but which had been amended by Congress in the exercise of its power to regulate the currency. It was ratified in 1934 by an exercise of the power to regulate currency (Gold Reserve Act of 1934), but was ratified in 1941 by an exercise of the war powers (First War Powers Act). Whatever type of emergency is deemed necessary to sustain the validity of Executive Order 6260 that emergency was present as a matter of law on February 12, 1954. The economic emergency of 1933 had never been terminated and a new war emergency which had been declared in 1950 also remained unterminated.

It is significant that the administrative construction given to Executive Order 6260 has consistently assumed the continuing existence of the requisite emergency and the continuing validity of Executive Order 6260. In 1947 President Truman amended Proclamation No. 2039 declaring the 1933 emeregency. The Secretary of the Treasury who was empowered to issue gold regulations by the terms of Executive Order 6260 amended those regulations in 1952. At that time the Trading with the Enemy Act and Executive Order 6260 were included in the citation of authority. In connection with these revisions the Notice

of Proposed Rule Making published in the Federal Register on April 30, 1952 (17 F. R. 3831), reads as follows:

> "The Gold Regulations are issued under the authority vested in the President in Section 5(b) of the act of October 6, 1917 * * * and delegated to the Secretary of the Treasury in Executive Order 6260, August 28, 1933 * * * the authority contained in sections 3, 8, 9, and 11, of the Gold Reserve Act of 1934 * * * and the authority with respect to the approval of Regulations delegated to the Secretary of the Treasury in Executive Order 10289, September 17, 1951 (16 F. R. 9499). The issuance of the Gold Regulations explicitly under the authority of Section 5(b) of the act of October 6, 1917, as amended, Executive Order 6260, Executive Order 6359, and Executive Order 9193, as well as the other authority cited is merely for the purpose of setting forth in detail existing law, e.g., that the prohibitions contained in said Act and Orders are still in full force and effect, that authorizations contained in the Gold Regulations or in licenses issued thereunder constitute authorizations under said Act and Orders, and that the penal provisions of said Act and Orders are applicable to violations of any provision of the Gold Regulations, of any license issued thereunder, or of any ruling, regulations, order, direction, or instruction issued by or pursuant to the direction of the Secretary of the Treasury pursuant to the Regulations in Title 31, Code of Federal Regulations, Part 54 or otherwise under Section 5(b) of the act of October 6, 1917, as amended."

The Gold Regulations were further amended by the Secretary of the Treasury in 1954 and again the

Secretary of the Treasury included in the citations of authority Executive Order 6260 (see 19 F.R. 4309, July 14, 1954). While admittedly the declarations of the Secretary of the Treasury or the President to the effect that Executive Order 6260 provides authority for the promulgation of regulations, could not render the Order valid in the face of a contrary decision by this Court, the administrative construction placed on the emergency proclamation of 1933 and on Executive Order 6260 should be entitled to great weight. The actions of the Executive Branch of Government with reference to Executive Order 6260 indicate the firm conviction by responsible officials of that branch that the requisite emergency of either a war or economic nature continued through 1954.

The doctrine that administrative construction given to statutes is entitled to great weight is based on several factors. Among others is the presumption that illegal action by officers would not long go unchallenged, *United States* v. *Midwest Oil Company*, 236 U.S. 459, 59 L.Ed. 673; the inconvenience and prejudice which would result from changing settled constructions, *Grand Trunk Western Railroad Company* v. *United States*, 252 U.S. 112, 64 L.Ed. 484; and the implied consent of the legislature in not changing a provision of law which has received a long settled construction, *Helvering* v. *Winmill*, 305 U.S. 79, 83 L.Ed.

52. All of these factors are present in the situation here involved.

It should be noted that in 1947 Congress carefully reviewed the wartime emergency legislation and by joint resolution terminated certain emergency and war powers which had been created by many statutes. In the resolution of July 25, 1947, entitled "Joint Resolution to Terminate Certain Emergency and War Powers", 61 Stat. 449 - 454, Congress enumerated many emergency statutes and repealed those statutes which had been applicable during the time of national emergency. In this careful effort to repeal emergency legislation which was no longer needed Congress made no reference to the gold legislation and to the power given to the President by 12 U.S.C., Section 95a. Since Congress, having power to terminate this legislation and the power given thereunder to the President, did not see fit to do so, it is respectfully submitted that this Court should not judicially declare the executive order invalid. The President, having the power under 12 U.S.C., Section 95a to declare the emergency and to make regulations, is the only official in whom the power exists to terminate that emergency. He has not done so and this Court should be slow to do so.

The question of the validity of Executive Order 6260 is one which can and should be decided by this

Court as a matter of law. In *Hirabayashi* v. *United States*, 320 U.S. 81, the Supreme Court of the United States had no difficulty in taking judicial notice of the facts of the war emergency as sustaining the constitutionality of curfew regulations promulgated under the authority of an executive order during World War II.

In *State of California* v. *Anglim* (9th Cir. 1942), 129 F. 2d 455, this Court took judicial notice of factual conditions in the railroad industry in sustaining the constitutionality of the Carriers Taxing Act of 1937 as applied to state-operated railways.

More recently in *Dennis* v. *United States*, 341 U.S. 494, the United States Supreme Court held the Smith Act constitutional as against a contention that there was no showing of the requisite "clear and present danger" to justify the restrictions imposed by that act on free speech. The court stated at page 514:

> "The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We hold that the statute may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the right to prevent. Bearing, as it does, the marks of a 'question of law,' *the issue is properly one for the judge to decide.* (Italics added.)

Surely if questions of the constitutionality of statutes based in part on factual considerations are decided by courts as matters of law, the question of the validity of Executive Order 6260 may be similarly decided by this Court.

C. IF FACTUAL EVIDENCE WAS NECESSARY TO A CONSIDERATION OF THE VALIDITY OF EXECUTIVE ORDER 6260, APPELLANT'S FAILURE TO OFFER EVIDENCE ON THAT ISSUE PRECLUDES FURTHER CONSIDERATION OF SUCH FACTUAL QUESTION.

While it may be seen from the above-cited cases that the Supreme Court has taken judicial notice of facts necessary to determine the constitutionality or validity of a challenged law (as we believe this Court should), nevertheless it may be conceded that there are many instances in the law where the factual considerations essential to a determination of the validity of a law are adduced from evidence taken at the trial of the proceeding in which the validity of the law is challenged. However, in such situations it has been decided that the burden is on the defendant who challenges the law to adduce those facts which he claims are fatal to its validity.

In *Whitney* v. *California*, 274 U.S. 357, the ap-

pellant challenged the validity of the California Criminal Syndicalism Law. In sustaining the validity of those statutes Justice Brandeis stated in his concurring opinion, at 379:

> "Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the state court cannot be disturbed."

If the burden was on the defendant in the *Whitney*

case to offer evidence as to facts which might invalidate the statute under which she was charged, so in the case at bar the burden was upon Harold G. Bauer to offer evidence in the trial court as to termination of the emergency. Appellant's failure to offer evidence of the absence of any emergency which could sustain the validity of Executive Order 6260 should foreclose further consideration of that factual question in this Court.

Other Federal cases holding that a defendant waives defensive matter by failure to properly offer evidence thereof in the trial court are:

Glasser v. *United States*, 315 U.S.60, 87.

The failure of the defendant who asserted that improper methods were used in selecting the jury panel to offer evidence of the claimed irregularities precluded him from raising the question in the appellate court.

Frazier v. *United States*, 335 U.S. 497.

The failure of the defendant to offer evidence that jurors were biased by reason of Government employment precluded his assertion on appeal that the trial court erred in failing to sustain his challenges to such jurors for cause.

Wright v. *United States* (C.A. - D.C. 1954), 215 F. 2d 498.

At the trial the defendant offered no expert evidence to sustain his defense of insanity. No issue of insanity was submitted to the jury. Subsequently, by motion for new trial the defendant sought to offer affidavits by psychiatrists on the issue. It was held that such affidavits were not "newly discovered evidence" and that the motion for a new trial was properly denied. The Court of Appeals for the District of Columbia in that case did not find it necessary to remand the case for a rehearing on the issue of defendant's insanity. By failure to present such evidence at the appropriate time the defendant had waived his right to urge the defense further.

In the case of *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543, it is true that the Supreme Court remanded a case for trial to the district court on the existence of the requisite emergency. However, it must be remembered that the proceeding was a civil case wherein a motion to dismiss the complaint had been granted. In the complaint the plaintiff sought to enjoin the enforcement of a regulation on the ground that the emergency which was necessary to sustain it had terminated.

In these circumstances and after holding that the

complaint stated a cause of action it was of course appropriate to reverse and remand the case for a trial on the issue. No opportunity had been afforded to the party challenging the legislation to offer evidence which might have established the invalidity of the law. Such is not the situation here. After a full trial on the merits and after a verdict of guilty, appellant should not now be entitled to a further hearing on an issue as to which no evidence was offered. The appellant who had a full opportunity to present any factual matters which affected the validity of the challenged executive order did not do so. Under such circumstances the appellant should be held to have waived his right to any further hearing.

D. THE COURT SHOULD CLARIFY THE NATURE OF THE FURTHER PROCEEDINGS TO BE HAD IN THE COURT BELOW.

While not conceding that any further hearing is necessary or required in the court below, it is nevertheless respectfully suggested that if this Court chooses to adhere to its present Opinion there should be some direction to the trial judge as to the nature of the further hearing directed by this Court. It is difficult to ascertain from the Opinion of January 29, 1957, whether this Court has ruled that the consideration of factual evidence is necessary. If further

factual testimony is required by this Court's Opinion, is the appellant entitled to a jury trial? Or is the issue one which can be determined by the Court alone without the necessity of further impaneling a jury? On whom does the burden of proof rest at such further proceedings? Is a showing of the existence of a *war* emergency sufficient to sustain the order or is an *economic* emergency required?

It has of course been held that questions concerning the validity of a statute may be properly litigated in a non-jury proceeding and that the defendant may not thereafter, in a criminal trial for violation of the law, assert the invalidity of the Statute under which he is charged. *Yakus* v. *United States*, 321 U.S. 414. However, in the *Yakus* case and others like it the Congress had provided a statutory tribunal to determine the validity of the challenged regulation. No such tribunal exists in the case at bar. The difficulties inherent in the piecemeal trial of criminal cases are well set out in the dissenting opinion in the *Yakus* case. If this Court chooses to adhere to its present Opinion, it is respectfully requested that further consideration be given to the nature of the proceeding to be conducted in the District Court so that a further appeal after such further District Court proceedings will be less likely to be necessary.

III.

SUMMARY AND CONCLUSION

This Court can and should determine the validity of Executive Order 6260 as a matter of law. Even if the Court feels that the question is in part dependent upon factual considerations, the Court may take judicial notice of the necessary facts. Even if the Court should not choose to do so, the facts which the Court feels are necessary to a consideration of this question are defensive matters which defendant-appellant should have offered to prove during the course of the trial below. If after consideration of these questions this Court still feels that a further hearing of some type is required in the court below, it is respectfully requested that the Court delineate the nature of the hearing which is to take place.

Respectfully submitted,

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United States Attorney

WILLIAM A. HELSELL
Assistant United States Attorney

Charles P. Moriarty and William A. Helsell certify hereby that they are counsel for appellee herein; that appellee makes the foregoing petition for rehearing *en banc* in good faith and that in their judgment and in the judgment of each of them, the said petition is well founded and is not interposed for delay.

CHARLES P. MORIARTY
United States Attorney

WILLIAM A. HELSELL
Assistant United States Attorney